UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEITH L. BURROWES, WILLIAM HAMMETT, FREDERICK W. LAMBRECHT, ELMER T. NITSCHKE, VERNON J. RAUSCH, SAM E. TAYLOR, SALLY WILLETT, Appellants, v. DEPARTMENT OF INTERIOR, and OFFICE OF PERSONNEL MANAGEMENT, Agencies.	DOCKET NUMBERS DC1221920015W1 DC1221920016W1 DC1221920017W1 DC1221920018W1 DC1221920019W1 DC1221920020W1 DC1221920021W1 DATE: JUL 27 1992

Edward A. Slavin, Jr., Esquire, Government Accountability Project, Washington, D.C., for the appellants.

Patricia M. Husted, Esquire, Washington, D.C., for the Department of the Interior.

James S. Wright, Esquire, Washington, D.C., for the Office of Personnel Management.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Chairman Levinson has recused himself and not taken part in the Board's consideration of these appeals.

OPINION AND ORDER

The appellants petition for review of the initial decision, issued December 9, 1991, that dismissed their

individual right of action (IRA) appeals. For the reasons set forth below, the Board GRANTS the appellants' petition, VACATES the initial decision, and REMANDS the appeals for further adjudication.

BACKGROUND

Before May 24, 1990, the appellants served as Indian Probate Judges (IPJ) with the Department of the Interior (DOI). During their service as IPJs, the appellants and the DOI entered into a dispute regarding whether the agency had authority to evaluate their performance. Four of the appellants, therefore, filed a grievance regarding DOI's authority to subject them to performance appraisals pursuant to 5 U.S.C. § 4301(2)(D). The grievance also alleged, among other matters, that the agency had harassed and threatened the grievants.

In a recommended decision, issued April 19, 1990, the grievance examiner sustained the grievance. The DOI deciding official found, however, that the issue of the grievance was mooted by passage of Public Law 101-301, that became effective on May 24, 1990. This law provided that the appellants were to be deemed to have been appointed to their positions under 5 U.S.C. § 3105. As such, they enjoyed the administrative law judge exemption from application of the performance appraisal provisions of 5 U.S.C. Chapter 43.

As a result of this legislation, the Office of Personnel Management (OPM) converted the appellants' positions to administrative law judges. In the course of this action, OPM

conducted a desk audit of the IPJ position, and classified the appellants' administrative law judge positions at the GS-15 level.

On September 27, 1991, the appellants filed IRA appeals alleging that DOI officials threatened to remove them, engaged in a pattern of harassment and intimidation, and entered into a conspiracy with OPM to classify their positions at a GS-15 level, rather than a GS-16 level, in retaliation for their protected activities. These activities included the filing of the above grievance, their petitioning Congress to establish an Office of Administrative Law Judges that is separate from DOI's Office of Hearings and Appeals, as well as their numerous other complaints of alleged agency wrongdoing.

The administrative judge consolidated the IRA appeals, and informed the appellants that a question existed regarding the Board's jurisdiction over this matter. Upon consideration of the jurisdictional submissions of all of the parties, the administrative judge dismissed the appeals, finding as follows: (1) The appellants identified two alleged personnel actions, a threatened removal and a conspiracy between OPM and DOI to classify their positions at the GS-15 level; (2) the Board lacks jurisdiction over the threat to remove them because the threat was made in reprisal for their grievance filing; (3) the appellants' petition to Congress was not a protected disclosure; and (4) the facts, as alleged by the appellants, reveal that OPM's and DOI's alleged retaliation

during the classification and conversion action were based upon their status as grievants.

In their petition for review, the appellants assert that their petition to Congress in the fall of 1990 was a protected disclosure under the Whistleblower Protection Act (WPA), and that the administrative judge failed to consider all of their assertions of protected disclosures, and retaliation.[1]

ANALYSIS

The appellants have not presented a non-frivolous allegation that their petition to Congress was a protected disclosure under the WPA.

The WPA prohibits an agency from taking, failing to take, or threatening to take a personnel action with respect to any employee, because of any disclosure of information by an employee, which the employee reasonably believes evidences a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8).

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[1] The appellants also argue that the administrative judge erred with respect to various procedural matters, and that the administrative judge erred in finding that matters covered under the grievance are beyond the Board's jurisdiction in an IRA appeal. The appellants, however, have not established how any alleged errors adversely affected their substantive rights, in light of our findings in this decision and Order. *See Karnbach v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981). Further, the administrative judge correctly found that, to the extent that a disclosure pertains to the appellant's filing of a grievance, it is not protected under 5 U.S.C. § 2302(b)(8). *See Fisher v. Department of Defense*, 45 M.S.P.R. 585, 587-88 (1991).

The Board has held that this provision's protections are not limited to employees who actually make protected disclosures. The Board has found that the WPA prohibits an agency from taking a personnel action against an employee because of his relationship with another employee who has made a protected disclosure. *See Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446-47 (1991).

In the present case, the appellants allege that their petition to Congress in the fall of 1990, as distributed by former Chief Judge McKenna, constitutes a protected disclosure. The petition at issue stated as follows:

> We, the undersigned United States Administrative Law Judges of the Department of the Interior, hereby petition the Congress to Establish an Office of Administrative Law Judges separate from the Office of Hearings and Appeals. Further, we pray that this Office report directly to the Office of the Secretary and it be so constituted to insulate it from political intrigue. A separate budget should be established to ensure that the resources needed for the hearing and deciding of cases are allocated properly.

Appeal File, Tab 23, Exhibit L. The appellants state that, while distributing this petition, Judge McKenna told Congressional "staffers" that the petition was intended to bring Congress's attention to the problems of mismanagement and abuse within DOI's Office of Hearings and Appeals, and that the initial decision in *McKenna v. Department of the Interior*, MSPB Docket No. DC0351910457I1 (November 6, 1991), held that Judge McKenna's actions in this regard was protected conduct. Appeal File, Tab 31. Thus, the appellants argue

that Judge McK[illegible]ng as their spokesperson in disclosing agenc[illegible]r[illegible]nd abuse.

We find that [illegible] does not constitute a non-frivolous allegation that the WPA protects the appellants from retaliation resulting from this disclosure. In reaching this conclusion, we agree with the administrative judge's determination that the petition, by itself, is not a protected disclosure because it does not evidence a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, as required under 5 U.S.C. § 2302(b)(8). Initial Decision at 7.

Under *Duda*, however, Judge McKenna's statements to Congressional "staffers" would protect the appellants from retaliation on the basis of the disclosure, if Judge McKenna disclosed gross mismanagement or abuse of authority on their behalf. The appellants' submissions below, however, do not constitute a non-frivolous allegation that Judge McKenna made a protected disclosure on their behalf. The appellants cite to certain pages in the transcript of the *McKenna* case, and rely upon the initial decision in *McKenna*, that states that the petition was sent to bring to the attention of Congress problems of mismanagement and abuse. Appeal File, Tabs 23, at 3 n.2; 31, at 10 n.7. The appellants, however, have not submitted the pertinent portions of the *McKenna* transcript into evidence. Thus, the record in the present case is devoid of evidence supporting the assertion the Judge McKenna's

statements to Congressional "staffers" evidence gross mismanagement or abuse of authority. *See* 5 C.F.R. § 1201.54.

Further, even if we were to consider the testimony in question, it does not establish that Judge McKenna made a protected disclosure. Our review of the *McKenna* transcript reveals that Judge McKenna testified that he prepared and distributed to Congress the petition to bring to their attention the "problems of mismanagement and political abuse that was rampant" in the Office of Hearing and Appeals. *McKenna* Hearing Transcript, Vol. 3 at 82-83. On its face, this statement does not reference the statutory requirement of "gross mismanagement." *See* 5 U.S.C. § 2302(b)(8). Further, Judge McKenna's bare statement of "abuse" within the agency does not qualify as a protected disclosure because the statute requires that the disclosure evidence an abuse of authority. *Id.* Finally, to the extent that the initial decision in *McKenna* found that the disclosures were protected, this determination has no precedential effect. *See National Labor Relations Board v. Beddow*, 47 M.S.P.R. 103, 105 (1991).

The initial decision does not contain findings on all of the material issues presented in this case.

An appellant who brings an IRA appeal must show by preponderant evidence that retaliation for a protected disclosure was a contributing, rather than a significant or predominant, factor in the action at issue. *See Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991). One of

the many possible ways to make this showing is by establishing that the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *Id.* Once an appellant shows that a protected disclosure was a contributing factor in the agency's action, the agency must establish, by clear and convincing evidence, that it would have taken the same action in the absence of the appellant's disclosure. *Id.*

In the present case, the appellants have alleged that they made numerous protected disclosures, both individually and through their representative, to DOI management, and to the DOI inspector general, and that DOI committed various personnel actions against them, in addition to OPM's alleged improper classification of their position.[2] Appeal File, Tabs 23, 31. The initial decision, however, does not discuss

[2] In its response to the appellants' petition for review, the DOI contends that the administrative judge incorrectly found that it committed the personnel action of classifying the appellants' positions at the GS-15 level. The Board need not consider this assertion, however, because DOI did not raise it in a timely filed petition for review, or cross petition for review. *See* 5 C.F.R. § 1201.114(b). In any event, we note that, as stated earlier, the administrative judge found that the appellants identified two alleged personnel actions, one of which was a conspiracy between OPM and DOI to classify their positions at the GS-15 level, and that the facts, as alleged by the appellants, revealed that OPM's and DOI's alleged retaliation during the classification and conversion action were based upon their status as grievants. In light of our decision to remand these appeals for further findings regarding whether the protected disclosures and alleged personnel actions are within the ambit of the WPA, we need not discuss DOI's assertion any further.

whether these disclosures are, in fact, protected under the WPA, and, if so, whether any of them was a contributing factor in any of the alleged personnel actions. Instead, the administrative judge simply concluded that, even if the facts alleged by the appellants were true, the threat of removal and ultimate classification were based upon the appellants' status as grievants, and not for their protected activities. Initial Decision at 4, 7-8. The initial decision, therefore, lacks the required findings on all of the material issues of fact and law presented in this case. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

ORDER

Accordingly, we REMAND these appeals to the Office of the Administrative Law Judge for further proceedings consistent with this Opinion and Order.[3] If the administrative judge finds that any of the numerous disclosures at issue are protected under the WPA, he should then determine whether the

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[3] The appellants have requested that this appeal not be remanded to the Office of the Administrative Law Judge, and that, instead, an independent administrative law judge should be appointed to adjudicate this matter. We find nothing in the initial decision or the record before us that creates doubts about the administrative judge's ability to impartially resolve the questions presented in this case. *See Williams v. Department of Defense*, 47 M.S.P.R. 461, 461 (1991). We, therefore, deny the appellants' request. We also deny their request for oral argument before the Board.

various actions the appellants have identified are personnel actions under the WPA, and then whether the appellants have proved their cases under the analysis in *Rychen*.

FOR THE BOARD:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.